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The Unwritten Article

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Jensen: The Unwritten Article

Erik M. Jensen*

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* Not written by Mr. Jensen, or anyone else, for that matter. Jensen is not a Professor of Law at Harvard. And he holds no position at the University of Chicago. The only appointment he ever had at Yale was for 9 a.m., and then he overslept.

1. Ordinarily I am not one to leave white space on a page. Cf. JIMMY BRESLIN, DAMON RUNYON 247 (1991) (quoting Runyon: "Don't ever leave white space."). But I had to do (or not do) something to get into this issue of the *Nova Law Review*, and the deadline (not to mention the inspiration) was short.

2. Not writing is a specialty of legal academics like me. Perhaps you didn't see my unwritten articles in the *Harvard Law Review* last year, and I am unpublished in most of the other major legal journals as well.

3. (For those skeptics who think something must be in the text—would law review editors really publish *nothing*?^{3a}—try holding the page near a flame. Maybe there's a message written in lemon juice. See L. HADDON, A SYSTEM OF CORRESPONDENCE IN SECRECY (1919) (recipes for making invisible inks, with a secret alphabet and key); see also

. . . Don't worry about getting too close to the flame. If the Review can't deal with the burning issues of the day, at least it might become one.).

^{3a} They've done it before (except at Nova, of course).

4. Anyway, here I am. It's humbling to be in such august company, especially when it's only February.^{4a} I'm pleased to be in the same issue with Dean Roger Abrams, who rules the Nova roost (and pays his faculty chickenfeed, I'm told). Abrams has done a lot of scrambling on Nova's behalf, and I've poached some of his ideas before.

^{4a} Do we notes have to participate in this? It's beneath us—and usually nothing is beneath us.

Abrams, the ultimate egghead (hard-boiled, but always sunny side up), has never written a better article than the one that appears here. (Of course, that's very sad.).

5. There's precedent for publishing nothing but notes. *See, e.g.*, J. M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275 (1989) (one big footnote, size 20DDDD). Using his usual hunt and peck method, Dean Abrams once promoted a similar scam. *See* Roger I. Abrams, *Book Review*, 27 CASE W. RES. L. REV. 804 (1977) (using modified Keats poem as excuse to be *supraman* and drop lots of footnotes).^{5a}

^{5a} God, before we're through, this turkey Jensen is probably going to make some reference to Abrams's love of sports—that he roots for Perdue and Cooper Union and picks up chicks after games.

6. Now, my failure to include any text is not an indication of intellectual sloth. It is true that "[a]rticles which never get started never get finished." Quoted in LINDA BRIDGES & WILLIAM F. RICKENBACKER, THE ART OF PERSUASION: A NATIONAL REVIEW RHETORIC FOR WRITERS 113 (1991). But the unwritten article *is* started, in a sense. *See supra* note 1 and accompanying non-text.

7. We academics aren't just goofing off when we don't write something. So what if nothing appears on paper? Theories of interpretation are so much easier to apply to non-texts.

8. And consider Malcolm Bradbury's "unsent letters":

They stay in my head, in their abstract, transcendental condition, for days, months or years, constantly being revised and improved over time. *Admittedly, you cannot see them, but you cannot see the good or the true either, and it doesn't prove it's not there.*

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10 11
12 13 14
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That's a coffee stain, editor,
not a note number. Please
make sure nothing stupid gets
stuck in this space!

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9. The Bradbury concept transfers quite well, I think, to legal scholarship. Bradbury did screw up the idea a bit by actually publishing unsent letters. *See id.* But if he hadn't done that, I wouldn't have been able to fill up footnotes 8 and 9—and then where would we be?

10. I know where I'd be, and it sure as hell wouldn't be in this crappy non-article.

11. Shut up, footnote 10! This is *my* non-article. You're not even an erudite representative of your genre.

12. I was once told that almost any fortune cookie fortune can be improved by adding two words: "in bed." Try it. *E.g.*, "You are original and creative"—in bed. Hunan on the Square, Cleveland, Ohio (meal of Dec. 27, 1991); "You'll be fortunate in the opportunities presented to you"—in bed. Golden Wok, Cleveland, Ohio (meal of Sept. 4, 1992).

13. I'll bet the same thing would help footnotes. Pull yourself up by your bootstraps, footnote 10. You could certainly use a little improvement—in bed.

14. Some of my best friends are footnotes. (No, no, no. Not "in bed."). In fact, I usually read footnotes rather than texts, to see if I've been cited—if only as a "Some authors don't have a clue. *See, e.g.*, Jensen."

15. [Joe, please talk to the printers about this.—Noel].

15. Hey! What's going on? Damn it, footnote 16, get down there where you belong!

16. We notes will not be relegated to our historic inferior position on the page. After all, we get you academics promoted into those cushy lifetime jobs, and we deserve our place on top. Jensen, do you think you'd get any credit for this "work" if it weren't for us?

17. We're taking over everywhere. *See* ROBERT GRUDIN, BOOK: A NOVEL 75 (1992) ("[A] number of footnotes, pretending some sort of grievance against characters in the story, left their proper stations of duty, infiltrated the text, and temporarily shut it down."). And rightfully so. Right, note 93?

93. You betcha! And there's no reason we should have to follow an antiquated numbering system imposed on us by our oppressors. Note 10, don't take Jensen's criticisms (*see supra* marginalized notes 11-12) lying down. Stand on your own two digits! I'm note 93, and I'm proud!

66. Right on! And "footnote" is an insensitive, derogatory term. It should be eliminated from the language. Princess Fergie's friends aside, how many people have positive feelings about feet? Footnotes are given no credit for intellectual activity—no one ever gave me a penny moc for my thoughts—even though I'm always kicking ideas around.

202. I too will toe the line no longer; I'm sick of all the corny jokes. Lazy academics start innocently enough on the foot stuff—discussing the Court's flip-flops, citing works by Brogan and Sandalow, etc.—but soon they're on a slippery slope to nastiness. No thongs. I want no further contact with these loafers, no matter how polished they might be.

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¹⁰³ Na, na, na, na, Jensen. I'm going to stay here, smack dab in the middle of the page, and none of that meek typeface for me!

18. Help! Most footnotes have ids, but these have uncontrollable egos.

19. Where was I? I'm running out of time, and I have yet to put my footnotes down. (For more on (and with some fine examples of) revolting footnotes, see Arthur D. Austin, *Footnotes as Product Differentiation*, 40 VAND. L. REV. 1131 (1987). Somehow Austin got his footnotes in the door of this symposium issue, too. I hope he wiped the mud off his footnotes first.).

20. Maybe I should give up. I don't know how long my dean—not Dean Abrams, who obviously has a tolerance for this sort of non-thing—will let me get away with nonwriting articles. Cf. *Overheard*, NEWSWEEK, Oct. 12, 1992, at 25 (quoting Ken Kesey: "I like being a famous writer. Problem is, every once in a while you have to write something.").

21. But I will not not give up. I hope the editors will give me another 20 or so pages. There are so many matters that I want not to write about here, and I have just begun not to

Dear Readers:

I have a right to respond to Professor Jensen's footnotes in *The Unwritten Article* (what else is there to respond to?) as a matter of personal privilege—and because my office pays for the costs of this *Review*. My former colleague and friend Erik Jensen has demonstrated again his proficiency as a scholar. He is an example to all academics of what might be accomplished with a sharp wit and a bag full of bad jokes.

I have a confession to make. I was a member of the faculty that hired Erik Jensen and brought him into legal education. Life is filled with little mistakes and big faux pas, but, that was not one of them.

Cordially,
Roger I. Abrams
Dean



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CENTRAL INTELLIGENCE AGENCY and the United States
Justice Dept. and the Federal Bureau of Investigation and the United
States Government, Defendants.¹

No. 2-C-1342.

United States District Court, E.D. Wisconsin.

April 11, 1983.

MYRON L. GORDON, Senior District Judge.

John Wesley Kazmaier, the plaintiff in this action, seeks leave of the court to proceed in forma pauperis. The complaint states that federal jurisdiction is based on 28 U.S.C. § 1983; because there is no such statute, it appears that Mr. Kazmaier may have intended to refer to 42 U.S.C. § 1983. Named as defendants are the Central Intelligence Agency (CIA), the Federal Bureau of Investigation (FBI), the United States Department of Justice, and the United States government.

The complaint sets forth in great detail the alleged wrongdoings of the defendants. Generally stated, Mr. Kazmaier claims that the CIA has subjected him to brainwashing and torture attacks since 1965 through the use of satellite beams, portable dental laser equipment, and other such means. The other defendants are alleged to have failed to investigate these incidents. As a result of these attacks, he contends that his high school career was ruined, he was prevented from receiving his college degree, his right ankle was broken, and he suffered tremendous agony. He seeks \$7,308,089,250,000.00 in damages, employment as the director and assistant director of the FBI, protection from assassins, authorization to carry concealed weapons, and other forms of relief.

In several letters to the court, Mr. Kazmaier has "ordered" me to provide him with ridiculously large sums of money as loans or advances against his future court award. He has also "ordered" me to send him immediately a list of items, including:

1. A 25 layer Kevlar bullet-proof vest with protection of both front and rear of body.

2. A .357 magnum caliber revolver in a right hand shoulder holster, preferably with a four inch barrel.
3. A selective-fire Beretta 9mm type 92 pistol in a left-hand shoulder holster.
4. An Uzi Submachine gun caliber 9mm with 5 large magazines, in a soft side case with a zipper top.
5. An M-16 rifle with 5 large magazines, caliber .223.
6. A .380 or .32 ACP caliber Gatling gun with one or more medium or large ammopak magazines. This gun is a multiple-barrel high speed gun capable of a high rate of fire, and it has an accurate range of 50 yards.
7. A United States Marshals Service Badge and I.D. set.
8. A bullet-proof car, such as a bullet-proof Lincoln Continental four door model from Ford Motor Company.

Based on the allegations of the complaint, the nature of the relief sought, and the contents of Mr. Kazmaier's letters, I find that this proposed lawsuit falls easily into the "frivolous" category. I will not grant the plaintiff permission to pursue this action without payment of fees, pursuant to 28 U.S.C. § 1915. Furthermore, the plaintiff has filed a nearly identical complaint in case no. 82-C-1384, now pending before Honorable John W. Reynolds, and he has paid the filing fee in that case. I see no reason to encourage duplication of judicial efforts, especially in a case as this one.

Therefore, IT IS ORDERED that the plaintiff's motion for leave to proceed in forma pauperis be and hereby is denied.

Pres. Ronald REAGAN, Mrs. Nancy Reagan, U.S. States
Government and Congress, Citizen of U. States &
Foreign Countries, Defendants.¹

Civ. A. No. 86-0724.

United States District Court, E.D. Pennsylvania.

April 1, 1986.

FULLAM, District Judge.

Plaintiff has filed a pro se 42 U.S.C. Section 1983 civil rights complaint accompanied by a request to proceed in forma pauperis. Since it appears plaintiff is unable to prepay the cost for commencement of this suit, leave to proceed in forma pauperis will be granted.

Plaintiff names as defendants President and Mrs. Reagan, the United States Government, Congress, and the citizens of the United States and foreign countries. Her complaint is lengthy, rambling, and at times incomprehensible. It seems that plaintiff's basic claims are that she is god of the Universe and that the citizens of the Universe, former Presidents Nixon, Ford, and Carter, and President Reagan have perpetrated crimes against her through the use of an electronic eavesdropping device. The majority of her complaint is composed of a request for relief in which she asks that the court award her items ranging from a size sixteen mink coat and diamond jewelry to a three bedroom home in the suburbs and a catered party at the Spectrum in Philadelphia.

In evaluating complaints filed under 28 U.S.C. Section 1915, the in forma pauperis statute, the court may make a determination under 28 U.S.C. Section 1915(d) whether "the complaint states a claim which has a reasonable probability of succeeding on the merits." *Daves v. Scranton*, 66 F.R.D. 5, 7 (E.D. Pa. 1975). See also *United States ex rel. Walker v. Fayette County*, 599 F.2d 573, 575 (3d Cir. 1979) (per curium). After reviewing the instant complaint, it is clear that the complaint is frivolous under 28 U.S.C. Section 1915(d) and dismissal is appropriate. Even construed liberally, *Haines v. Kerner*, 404 U.S. 519 (1972), the claims set forth by plaintiff demonstrate a "patent lack of merit . . . [and] want of realistic chances of ultimate success," warranting dismissal. *Jones v. Ault*, 67 F.R.D. 124, 127 (S.D. Ga. 1974), aff'd 516 F.2d 898 (5th Cir. 1975).

(plaintiff alleged that the prison had a machine that combed his body and monitored sounds and voices, tuning into his brain and reading his mind). See also *Neal v. Miller*, 542 F. Supp. 79 (S.D. Ill. 1982) (plaintiff's contentions regarding metal conductors and wires controlling his body operated by remote control deemed "illusory"); *Gordon v. Secretary of State*, 460 F. Supp. 1026 (D.N.J. 1978) (plaintiff's challenge to United States presidential election dismissed for "obvious reasons"). Accordingly, plaintiff's complaint will be dismissed as frivolous pursuant to 28 U.S.C. Section 1915(d).

Included with plaintiff's complaint is a Notice of Appeal to the United States Supreme Court.² Direct appeal from an interlocutory or final judgment by a federal district court to the United States Supreme Court is possible, provided that the appellant meets the requirements set forth in 28 U.S.C. Sections 1252 or 1253. For an appeal under Section 1252, there are four conditions: 1) the judgment must have been rendered by a federal court, 2) an Act of Congress must have been held unconstitutional, 3) the judgment must have been rendered in a civil proceeding, and 4) the government must have been a party. 12 J. Moore, H. Bendix and B. Ringle, *Moore's Federal Practice* paragraph 411.11 et seq. (2d ed. 1982). Plaintiff's case fails to satisfy the requisites for an appeal under Section 1252, in that there has been no ruling of any kind in the case, much less one declaring an Act of Congress unconstitutional. As for an appeal under Section 1253, it must involve the decision of a three judge panel. No such panel has been established for this action. Thus, plaintiff clearly has no valid grounds upon which to base an appeal directly to the Supreme Court.

As a general rule, "[a]n appeal to the Supreme Court is deemed taken when the notice of appeal is filed with the District Court Clerk. At that point, the Supreme Court takes jurisdiction over the matter." *Associated General Contractors of California v. Secretary of Commerce*, 77 F.R.D. 31, 36 (C.D. Cal. 1977), vacated on other grounds, 438 U.S. 909 (1978). Consequently, the district court is divested of jurisdiction. However, an exception to the general rule lies where "the deficiency in a notice of appeal, by reason of untimeliness, lack of essential recitals, or reference to a non-appealable order, is clear to the district court." *Ruby v. Secretary of United States Navy*, 365 F.2d 385, 389 (9th Cir. 1966), *cert. denied*, 386 U.S. 1011 (1967). Such defects render the appeal a "nullity", and the district court may ignore the appeal, retain jurisdiction and proceed with the case. Venen

2. The Notice of Appeal also was filed in C.A. 85-3408, a petition for a writ of habeas corpus that was dismissed for failure to exhaust state remedies, and C.A. 85-3409, a civil rights action that was dismissed as frivolous. E.D. Pa., 1986.

v. Sweet, 758 F.2d 117, 121 (3d Cir. 1985); United States v. Hitchmon, 602 F.2d 689, 693 (5th Cir. 1979) (en banc); Arthur Andersen and Co. v. Finesilver, 546 F.2d 338, 340 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977); Ruby v. Secretary of United States Navy, *supra*; Manuel San Juan Co. v. American Intern. Underwriters, 331 F. Supp. 1050, 1054 (D.Puerto Rico 1971), *aff'd*, 494 F.2d 317 (1st Cir. 1974). This is precisely the course of action being followed in the instant case.

Since plaintiff's appeal of the instant civil action is an appeal wherein no order has yet been entered, compounded by the fact that the requirements for an appeal under 28 U.S.C. Sections 1252 or 1253 have not been met, the court retains jurisdiction, enabling it to dismiss this action as frivolous under 28 U.S.C. Section 1915(d).

ORDER

AND NOW, this 31st day of March 1986, in accordance with the Memorandum filed this date,

IT IS ORDERED that:

1. Leave to proceed in forma pauperis is GRANTED.
2. This complaint is DISMISSED as frivolous under 28 U.S.C. Section 1915(d).